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SUPREME COURT, U.S.
FILED

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

GAIL S. WILLARS
Petitioner

v.

JONES, WARDEN

LA. CORRECTIONAL

INSTITUTE FOR WOMEN
Respondent

Petition for Writ of Certiorari
To The 5th Circuit Court of Appeal

Arax "Renee" Brumfield
Counsel of Record
Brumfield & Brumfield
4560 Inniswold
Baton Rouge, Louisiana 70809
(225) 292-6151
(225) 292-6150 (fax)

43?

I. QUESTIONS PRESENTED

1. Did the Court of Appeal err when it failed to grant Petitioner's certificate of appealability.

2. Did the Court of Appeal err when it decided that Petitioner failed to show substantial denial of a Federal Right (i.e. Constitutional Right).

II. LIST OF PARTIES

1. Gail S. Willars

2. Mr. Richard P. Ieyoub, Department of Justice, the State of Louisiana.

3. Warden, La. Correctional Institute for Women

III. TABLE OF CONTENTS

QUESTIONS PRESESNTED. 1

LIST OF PARTIES 2

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 4

OPINIONS BELOW 7

JURISDICTION 9

STATUTES & CONSTITUTIONAL PROVISIONS 10

STATEMENT OF THE CASE 18

REASONS FOR GRANTING WRIT 26

CONCLUSION 43

The appendix is filed as a separate document

IV. TABLE OF AUTHORITIES

		Pages
1.	U. S. Constitution, Article III, Section 2	10
2.	U.S. Constitution, Amendment V	10
3.	U.S. Constitution, Amendment VI	11,30,32
4.	U.S. Constitution, Amendment XIV	11, 32
5.	28 U.S.C. 1253	12, 25
6.	28 U.S.C. 1254(1)	12
7.	28 U.S.C. 2254	8,9,11,26
8.	La. Constitution, Article 1, Section 16	14
9.	La. C.Cr.P. Art. 701	15,34,36
10.	La. C.Cr.P. Art 704	15
11.	La. R.S. 14:64 & 14:64.1	15, 39
12.	La. R.S. 14:65	17
13.	La. R.S. 15:438	17
14.	La. R.S. 14:30, 14:30.1 & 14:31	13
15.	Barker v. Wingo 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed 2d 101 (1972)	38
16.	Bates v. Blackburn, 805 F.2d 568 (5th Cir 1986)	30
17.	Cage v. Winship, 498 U.S. 39, 111 S.Ct. 328 (1990) (per curiam)	41

18. Chambers v. Armontrout, 805 F.2d 1318 32

19. Gray v. Lynn (5th Cir. 10/20/93) 6 F.3d 265 32

20. Hohn v. United States (S.Ct. 1998) 524 U.S. 236 9

21. Humphrey III v. Cain, (5th Cir April 3, 1998), 120 F.2d 326, 138 F.3d 552. 40

22. Johnson v. Estelle, (5th Cir 1983)704 F.2d 232 , No. 82-2033 29

23. Maddox v. Lord, 818 F.2d 1058 32

24. Murphy v. Johnson, 110 F.3d 10, 1(5th Cir. 1997)27

25. Robins v. Smith, 125 F.2d 831 (9th Cir 1997) 29

26. State v. Beauchamp, (La. App 1st Cir 1987), 37, 38 510 So. 2d 22, writ denied, 512 So. 2d 1176 (La. 1987)

24. State v. Walter Cowger, (5th Cir March 13, 1991),38

25. State v. Johnson, (La. 1978), 463 So2d 458. 29

26. State v. McGraw, (La. 1978), 366 So.2d 1278, at 1283 36

27. State v. Pleasant, (La. App 1st Cir 1986), 489 So.2d 100, writs denied, 493 So.2d 1218 (1986) 37

28. State v. Potter, 92-K-2552 (La. App 4th Cir 1/4/93), 612 So.2d 953.Writs denied 619 So.2d 574 (1993).32

29. State v. Prudholm, (La. App Jan 16, 1984), 446 So.2d 729 35

30. State v. Sosa, (La. App. 4th Cir 1984), 446 So. 2d 429, writ denied, 469 U.S. 866, 105 S.Ct. 209. 37

31. Strickland v. Washington, 466 U.S. 2052 (1984) 29

32. State v. Turner, (La. App, Dec 15, 1978), 365 So.35 2d 1352 writ denied 493 So. 2d 1218 (La. 1986)

33. U.S. v. Haese, 97-10307 (5th Cir. 1999) 29,40

34. Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239 (1994) 41

35. In Re Winship, (S.Ct. 1970), 397 U.S. 358, 90 S.Ct. 1068 41

ON PETITION FOR WRIT OF CERTIORARI
To The 5th Circuit Court of Appeal

The Petitioner, Gail S. Willars, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the U.S. Court of Appeals, Fifth Circuit on April 6, 1999, rehearing denied July 12, 1999).

V. OPINIONS BELOW

August 14, 1991	Willars was convicted of 2nd Degree Murder on the 17th day of February, 1991 and sentenced to mandatory Life in Prison without benefit of probation or parole Aug. 14, 1991 in State of Louisiana vs. James Crandall and Gail Willars, Docket No. 68,208, 26th Judicial District, Bossier Parish, La.
August 11, 1994	Petition for Post Conviction Relief was filed in the Bossier Parish. The Petition was granted for purpose of allowing an out of time appeal. No hearing was allowed.
September 27, 1995	Conviction affirmed in the La. 2nd Circuit Court of Appeals, Docket No. KA/94/27394. State of Louisiana, vs. Gail Willars, (La.App. 2 Cir. 9/27/95); 661 So.2d 673
March 29, 1996	Writs denied in the La. Supreme Court. State of Louisiana vs. Gail Sue Willars, (La.S.Ct. 1995), Appeal No. 95 K 2825,

May 3, 1996	Motion for Rehearing from the Louisiana Supreme Court was denied.
December 12, 1996	A second Petition for Post Conviction Relief was filed in the 26th Judicial District Court. (issues same as 1st Petition.) It was denied on the 19th of December as being repetitive. "ORDER" This application is repetitive and devoid of merit. It is denied. S/ Judge Drew. *(all issues presented had already been decided by La. Court of Appeals and Supreme Court.
March 26, 1997	Petition for Writ of Habeas Corpus under 28 U.S.C. 2254 – State Custody was filed in the United States District Court, Middle District of Louisiana and transferred to the Western District of La. As case no. 97-0693.
September 4, 1998	Petition for Writ of Habeas Corpus denied.
September 8, 1998	Judgment entered, denying Petition for Writ of Habeas Corpus
September 18, 1998	A Notice of Appeal to the 5th Circuit Court of Appeal was timely filed.
October 1, 1998	Judge Stagg, U.S. District Court, Western District of Louisiana, denied Certificate of Appealability because "the applicant has failed to demonstrate a substantial showing of the denial of a constitutional right"
October 12, 1998	Petition to Certify Appealability was filed with the 5th Circuit Court of Appeals

April 6, 1999	Certificate of Appealability was denied by the 5th Circuit Court of Appeals
July 12, 1999	Petition for Rehearing was denied

VI. JURISDICTION

Willars filed a Petition for Writ of Habeas Corpus under 28 U.S.C. 2254 on March 27, 1997 in the U.S. District Court, Middle District of Louisiana, Suit No. 97-236-A,(transferred to Western District of Louisiana, No. 97-0693)seeking relief from a conviction in the 26th Judicial District Court, Bossier Parish, Louisiana. State remedies were exhausted. The Petition was denied and a timely appeal was filed to the 5th Circuit Court of Appeal, Docket No. 97-31043. Certificate of Appealability was denied by the district court judge.

An application for Certificate of Appealability was filed by Willars on October 12, 1998 to the 5th Circuit Court of Appeals. Certificate of Appealability was denied on April 6, 1999 and rehearing was denied on July 12, 1999.

The United States Supreme Court has jurisdiction under 28 U.S.C. 1254(1) to review denials of applications of Certificates of Appealability by a circuit judge or a court of appeals panel, Hohn v. United States, (S.Ct. 1998) 524 U.S. 236.

VII. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article III, Section 2 *Judicial power; to what cases it extends*... 1. The judicial power shall extend to all cases, in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; ..."

U. S. Constitution, Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution, Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

28 U.S.C. § 2254. State custody; remedies in Federal courts. (a) The Supreme Court, a Justice thereof, a circuit

judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States...

28 U.S.C. 1254(1) Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1)By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ...

2 8 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a

State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Louisiana Constitution, Art. 1, Sec. 16

16. Right to a Fair Trial

Section 16. Every person charged with a crime is presumed innocent until proven guilty and is entitled to a speedy, public, and impartial trial in the parish where the offense or an element of the offense occurred, unless venue is changed in accordance with law. No person shall be compelled to give evidence against himself. An accused is entitled to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, to present a defense, and to testify in his own behalf. However, nothing in this Section or any other section of this constitution shall prohibit the legislature from enacting a law to require a trial

court to instruct a jury in a criminal trial that the governor is empowered to grant a reprieve, pardon, or commutation of sentence following conviction of a crime that the governor in exercising such authority may commute or modify a sentence of life imprisonment without benefit of parole to a lesser sentence which includes the possibility of parole, may commute a sentence of death to a lesser sentence of life imprisonment without benefit of parole, or may allow the release of an offender either by reducing a life imprisonment or death sentence to the time already served by the offender or by granting the offender a pardon.

La. C.Cr.P. Art 701. A. The state and the defendant have the right to a speedy trial...

D. (1) A motion by the defendant for a speedy trial, in order to be valid, must be accompanied by an affidavit by defendant's counsel certifying that the defendant and his counsel are prepared to proceed to trial within the delays set forth in this Article. After the filing of a motion for a speedy trial by the defendant and his counsel the time period for commencement of trial shall be as follows:

(a) The trial of a defendant charged with a felony shall commence within one hundred twenty days if he is continued in custody and within one hundred eighty days if he is not continued in custody.

(2) Failure to commence trial within the time periods provided above shall result in the release of the defendant without bail or in the discharge of the bail obligation, if after contradictory hearing with the district attorney, just cause for the delay is not shown.

E. "Just cause" as used in this Article shall include any grounds beyond the control of the State or the Court.

F. A motion for a speedy trial filed by the defendant, but not verified by the affidavit of his counsel, shall be set for contradictory hearing within thirty days.

La. C.Cr.P. Art. 704. Severance

Jointly indicted defendants shall be tried jointly unless:

(1) The state elects to try them separately; or

(2) The court, on motion of the defendant, and after contradictory hearing with the district attorney, is satisfied that justice requires a severance.

La. R.S. 14:64. Armed robbery

A. Armed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.

La. R.S. 14:65. Simple robbery

A. Simple robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, but not armed with a dangerous weapon.

La. R.S. 15:438. Circumstantial

The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence.

La. R.S. 14:30 First Degree Murder

A. First degree murder is the killing of a human being (1) when the offender has specific intent to kill or inflict great bodily harm and is engaged in the perpetration or attempted

perpetration of aggravated kidnapping, second degree kidnapping, ... armed robbery, ... first degree robbery, or simple robbery.

La. R.S. 14:30.1 Second Degree Murder

A. Second degree murder is the killing of a human being (1) When the offender has a specific intent to kill or to inflict great bodily harm; or (2)(1) When the offender is engaged in the perpetration or attempted perpetration of ... second degree kidnapping,..armed robbery, first degree robbery or simple robbery, even though he has no intent to kill or inflict great bodily harm...

La. R.S. 14:31 Manslaughter

...(2) A homicide committed, without any intent to cause death or great bodily harm (a) When the offender is engaged in the perpetration or attempted perpetration of any felony not numerated in Article 30 or 30.1, or of any intentional misdemeanor directly affecting the person;

VIII. STATEMENT OF CASE

Gail Willars was convicted of 2nd degree murder in connection with the death of Charles Parr on the 20th of August, 1989. James Crandell, Willars' co-defendant was tried with her and was convicted of 1st degree murder. Both were sentenced to life in prison without benefit of probation or parole.

Gail Willars' testimony at trial revealed the following tragic sequence of events. During the summer of 1989, Willars, her eight year old son, Zachary and James Crandell migrated to Bossier City, Louisiana and temporarily resided at the Beacon Manor Motel. Willars received a monthly insurance check the first of each month. Towards the end of August, 1989, the trio ran short of funds to cover rent. Eviction was imminent.

Willars' co-defendant, James Crandall demanded Willars prostitute herself to raise funds. After her father refused to send her an advance, Willars agreed to prostitute herself.

On the August 20, 1989, Willars instructed Crandell and her son to leave the room while she took care of her business. Ignoring Willars' instructions, Crandall and Zachary hid in the bathroom.

Willars met Parr outside the motel, made monetary arrangements, and agreed that Gail would perform oral sex. Once inside the room, Parr became abusive when Gail refused to do more than oral sex. He picked her up by the shoulders and lifted her off the ground.

Crandell jumped out of the bathroom and began fighting with Parr. After a struggle, Crandall subdued him, taped his mouth and shoved him into the closet. Parr freed himself and the two men continued to fight. Crandall hit Parr in the head with a frying pan several times and stuffed him back into the closet.

Believing Parr to be gravely injured, Willars attempted to help him. Crandell ordered Willars to leave Parr alone. She was told Parr was dead and there was nothing she could do for him.

Crandall ordered Willars to clean the room and check out of the motel. Willars obeyed to protect her son. Crandall would not allow Zachary out of his sight. Gail was reasonable to believe that she and her young son were in danger and one wrong move on her part could result in the death of her son.

The trio fled to Chicago in Parr's vehicle. Shortly after their arrival, Willars and Crandall were arrested, transported to Louisiana and charged with first degree murder.

On April 10, 1990, Willars' court appointed attorney, Robert Raley requested that the trials of Willars and Crandell be severed. Judge Kitchens denied Raley's request the following day.

During the trial, Crandell filed a Motion in Limine. Because the two were being tried together, Willers was limited in developing her strongest defense, the abusive nature of Crandell. The court, in its ruling stated:

> Page 936, line 13 of the record
>
> THE COURT: All right. So noted, counsel. Then just for the clarity Madam Clerk, on the Motion in Limine filed on behalf of Mr. Crandell today, while I am instructing Mr. Raley not to seek to elicit testimony from his client merely for the purpose of showing the alleged bad character of Mr. Crandell, I will allow him to elicit the testimony from his client in explaining her situation and explaining her side of the case. So I will deny this request to limit the testimony extended by Mr. Stinson..... And for one thing, the remedy in a situation like this normally would be a severance. Short of severance, which I don't think either defendant wants, short of severance, I don't know what else to do but allow her to tell the story. And I will give the—appropriate limiting and cautionary instructions later..."

Willars was denied a severance by Judge Kitchens; however, Judge Drew ruled that she should have requested a severance.

Margie Theodos, part owner of the Beacon Manor Motel testified that Gail Willars, Zachary Willars and James Crandell stayed in Room 15 of the Beacon Manor Motel for part of July and most of August, 1989 under the name of Mr. and Mrs. James Crandell. Room 15 was a large room with mirrors everywhere, a kitchenette and an adjoining bathroom. Theodos gave Willars by 10:00 a.m. August 21, 1989 to pay the rent or move.

The second witness, George McCormick, Coroner of Caddo Parish and Deputy Coroner of Bossier Parish testified that Mr. Parr suffered multiple injuries consistent predominately with blows by a blunt instrument. He found abrasions and scraping of the skin on the knees, bruises on the ankles and areas of blanching or whitening of skin around the wrist consistent with having been bound. Parr suffered severe head trauma. McCormick testified that bruises on the victim were consistent with dragging and many wounds appeared to be defensive wounds consistent with an

altercation. This testimony was in direct conflict with Zachary's testimony denying an altercation.

Ms. Alder, the sixth witness testified that Crandell, Willars and Zachary traveled to her house after Crandell killed Parr. She made the following inculpatory statements.

Page 1068, Line 10

Q. Now, pertaining to their coming to Chicago, what did they tell you?

A. They both at separate times said they had to come to Chicago to leave Gail's son Zachary with my husband and I because they had to kill a man and were running from the law."

This statement had been suppressed the morning of the jury selection, yet Bullers asked a question he new would result in the suppressed testimony and Raley failed to object.

Mr. Bullers, the Assistant District Attorney had amended his response to discovery on the 1st day of Jury selection (February 12, 1991) giving notice that Ms. Alders would recount inculpatory statements made by both defendants. Counsel for Defendant objected to those statements being made at trial and the Judge signed an order suppressing the statements of both Ms.

Alders and Ms. Page on the 13th of February 1991 (prior to Ms. Alders testimony).

Zachary denied Parr struggled with Crandall. He testified Willars handed Crandall the frying pan used to kill Parr.

Willars vehemently denied handing Crandell the murder weapon (the frying pan). Zachary's testimony that "Mom handed him the frying pan" was the most damning testimony of the trial..

Prior to Zachary's testimony, a cursory competence hearing out of the presence of the jury was held by Judge Drew. This "hearing" was a sham. This hearing was held without the benefit of the psychiatric records in the possession of Robert Raley, Gail Willars' attorney. The psychiatric documents demonstrate without a doubt that Zachary was not competent to testify and had a propensity to lie.

The court ruled that Zachary was competent to testify, noting that:

> p. 1082 line 6
>
> The Court: All right, counsel, cases under the evidence code indicate the court has wide discretion. Considering the child's overall demeanor and considering the fact that the child did not appear to be coached, considering his grades in school, I think that he is an intelligent child, and I think considering his age, I certainly think he is

competent to testify and I will so rule at this time, noting error being assigned by both counsel."

The transcript showed not only that Zachary was coached, but that Zachary was coached during testimony. Joan Carraway, Clerk of Court testified that she observed Zachary talking to someone in the audience while he was on the stand. Joan Carraway had no reason to make up this allegation.

Without the psychiatric reports from Charter Hospital, Willars had no way to prove that Zachary failed kindergarten, that Zachary was in special education, that Zachary blamed his mother for the death of his father, that Zachary had severe emotional problems effecting the way he perceived things or that Zachary had problems with relating events accurately.

Even though Raley had the Charter Hospital Records in his possession, he never introduced them at the trial, either for the purpose of determining Zachary's competency or for credibility purposes.

James Crandell declined to testify; however, letters written by Crandell were introduced into evidence without objection, denying Gail's involvement in the murder.

All Constitutional issues argued in this writ were first presented to the 26th Judicial District Court, State of La. In Petition for Post Conviction Relief on the 15th of August, 1994. The Honorable Judge Drew granted an out of time appeal only. All issues were presented to the 2nd Circuit Court of Appeal, State of Louisiana and the Supreme Court. See page 25 of appendix for Court of Appeal decision and page 54 denial of Supreme Court Writ . The issues were presented by Petition for Habeas Corpus to the U.S. District Court, Western District of Louisiana and denied. See p. 55, Excerpts from Petition for Writ of Habeas Corpus, p. 71, Excerpts from Brief in Support of Writ of Habeas Corpus, p. 82 for Report and Recommendation of Magistrate and p. 107 for Judgment of District court. A Motion for Certificate of Appealability to the 5th Circuit was denied. P. 151, rehearing denied, p. 154.

IX. REASONS FOR GRANTING WRIT

The court erred in refusing to grant Willars' Motion to Certify Appealability. *(Question presented 2)*

28 U.S.C. § 2254 provides for State custody remedies in Federal Courts on Petition for Writ of Habeas Corpus on the ground that the person is in custody in violation of Constitutional Laws or treaties of the United States

Willars filed a Petition for Writ of Habeas Corpus in Federal court alleging a number of Constitutional violations. There was complete exhaustion of State Court Remedies on the issues presented to the Judge for Habeas Corpus relief. Judge Stagg ruled adversely to Willars.

An appeal of a denial of a Petition for Habeas Corpus of a state court conviction may be taken to the U.S. Court of Appeals, however, 28.U.S.C. 2253 provides a Certificate of Appealability must be granted. A Certificate of Appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right.

Standards for granting a Certificate of Appealability were addressed in Murphy v. Johnson, 110 F.3d 10, 11 (5th Cir. 1997) as being the same as the old Certificate of Probable Cause. The court engaged in a two-step process. The court must first decide if there has been a credible showing of exhaustion; then it must decide if the underlying claim is debatable among reasonable jurists. Only if the answer to the second question is in the affirmative has there been a substantial showing of the denial of a constitutional right. Both steps were met in the Willars case.

Unlike Willars, Murphy contained both exhausted claims and unexhausted claims[1]. The court ruled:

> Therefore, he has failed to satisfy the exhaustion requirement and, accordingly, is not entitled to a COA.

[1] Magistrate Payne sent notice to appellant that her petition contained both exhausted and unexhausted claims. He ordered Petitioner to dismiss the unexhausted claims or the entire Petition would be dismissed. Petitioner voluntarily dismissed the claims Magistrate listed as unexhausted.

SUBSTANTIAL SHOWING OF DENIAL OF CONSTITUTIONAL RIGHTS

(Question Presented 2)

Serious violations of constitutional rights were committed in the Willars case. Any one error was severe enough to change the outcome of the verdict. A combination of these errors assured that Willars would be convicted of second-degree murder and sentenced to life behind bars.

As will be shown in the cited cases, the Louisiana Supreme Court denied writs on a 2nd Circuit Court of Appeals decision which was contrary to the United States Constitution and in contravention of U.S. Supreme Court decisions and Court of Appeals decisions.

As to effective assistance of counsel, the 9th Circuit Court of Appeals and 5th Circuit Court of appeals take contrary positions on the issue as to whether or not it is error for a district court to grant an out of time appeal without holding an evidentiary hearing to decide a claim of ineffective assistance of counsel.

Effective Assistance of Counsel

Willars argued at all stages of the state court proceedings that she was denied effective assistance of counsel as required by the 6th and 14th Amendment to the United States Constitution. Denial of effective assistance of counsel was properly pled in the Habeas Corpus Proceeding.

Ineffective assistance of counsel is generally litigated in state post conviction relief or Federal Habeas Corpus. Facts constituting ineffective assistance of counsel are established at hearings on post conviction relief. The 9th Circuit in Robin v. Smith (9th Cir 1997) 125 F.3d 831 held it to be error for a district court to grant an out of time appeal without conducting a hearing on the issue of ineffective assistance of counsel. The 5th Circuit held the opposite in U.S. v. Hess, (5th Cir 1999), Docket No. 97-10307.

The United States Supreme Court set the standard for establishing ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 2052 (1984) by establishing a two prong test.

The defendant must first show that counsel's performance was defective; that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment to the United States Constitution.

The 5th Circuit in Johnson v. Estelle, 704 F.2d 232, No. 82-2033, 1983 added the requirement that "but for counsel's unprofessional errors, the result of the proceeding would be different. Bates v. Blackburn, (5th Cir 1986) 805 F. 2d 569.

The state court of appeals acknowledged that the first prong of the two-prong test was meet by Robert Raley's failure to object to Ms. Alders' testimony concerning any "admissions" Willars may have made p. 40 and 41 of the appendix. Other errors made by Raley either by themselves or in connection with other errors met the first prong of the test, namely, failure to submit the records from Charter Hospital, failure to call witnesses, cross examining Willars' young son and leading him into testifying against her interests, and failure to insist upon severance.

One of the most serious errors was her attorney's failure to submit psychological records of Zachary. Quotations from

psychological reports are on pages 73-78 of the Appendix. The quotations demonstrate Zachary's severe emotional problems, limited mental abilities and propensity to deviate from the truth. These records were submitted in the State Court Petition for Post Conviction relief, on direct appeal to both the Court of Appeals and the Supreme Court and on the U.S. District Court Petition for Habeas Corpus.

Dr. Sue Williams noted Zachary to have a full scale IQ of 71 (borderline intelligence), p. 73 of the appendix. She stated on page 74 that "It is my impression that Zachary may be capable of functioning at least in the dull average range were it not for his disturbances." On page 77 of the appendix, a Psychiatric Evaluation compiled by Dr. Van Dyke Degola, M.D. Documented the following behaviors...F. Psychosis (2) Delusional/grandiosity...(7) lying.

The second prong of the two-prong test set out in Strickland, supra was that the defendant must show that the deficient performance prejudiced the defense. Clearly, the errors made by counsel guaranteed that Willars would be unjustly convicted of 2nd Degree Murder.

The 4th Circuit in State v. Potter, 92-K-2552 (La. App. 4th Cir, 1993), 612 So.2d 953 held failure to interview and subpoena witnesses who would have corroborated defendant's theory of self-defense and failure to argue manslaughter as a responsive verdict ineffective assistance of counsel. Failure to call and interview witnesses was also found to be ineffective assistance of counsel by the 8th Circuit in Chambers v. Armontrout, (8th Cir 1989), 885 F.2d 1318. The court in Maddox v. Lord, (2nd Cir. 1987) 818 F.2d 1058 found failure to present witnesses and failure to show emotional problems of defendant deficient. Failure to object was found to be deficient in Gray v. Lynn, (5th Cir 1993), 6 F.3d 265.

Willars easily met the two-prong test set forth in the cases in violation of the 6th and 14th Amendments to the United States Constitution. But for the errors, Willars would not have been convicted of 2nd degree murder.

RIGHT TO CONFRONTATION

Willars' Constitutional Right to Confrontation was violated when the judge did not allow the defense counsel the opportunity to cross-examine Zachary Willars at the competency

hearing; even though he offered the District Attorney the opportunity to ask questions. This error cannot be considered harmless when you consider the fact that Zachary believed his mother had killed his father, Zachary' limited mental and emotional capacity and the fact that Zachary was dysfunctional.

The court was initially going to allow both Prosecution and Defense to question Zachary on the issue of competency, but after Bullers declined, Willars' attorney was not give the opportunity to question Zachary.

p. 1078 of trial transcript, line 2

"THE COURT: American Airline? Okay, The—do any of the attorneys desire to ask the witness any questions?

MR. BULLERS: Your honor, I think it would be appropriate for the court to handle that. I think that would be the best procedure.

THE COURT: The—do any of the defense lawyers feel they should be allowed to ask the witnesses any questions? I think this is a determination for the court. Is there anything – lets put it this way, is there anything that defense counsel would like me to go into?"

The court proceeded to question Zachary some more on the areas that concerned Robert Raley, but that is not the same as Robert Raley being able to examine the witness himself. The court ruled on Zachary's competence as follows:

THE COURT: All right counsel, Cases under the Evidence Code indicate the Court has a wide discretion. Considering the child's overall demeanor and considering the fact that the child did not appear to be coached, considering his grades in school, I think that the child is an intelligent child, and I think considering his age, I certainly think he's competent to testify, and I will so rule at this time, noting error being assigned by both counsel.

Several persons, including Joan Carraway, Clerk of Court observed Zachary communicating with someone in the audience while testifying. Mr. Evens, one of Gail's attorneys and observers in the courtroom also thought Zachary was communicating with someone in the courtroom. P.66 appendix.

REFUSAL TO SEVER
DENIAL OF DUE PROCESS

Due to the conflicting nature of Willars' and Crandall's defense, it was error not to sever the trials of Willars and Crandall. Willars was Crandall's defense and Crandall was Willars' defense. Willars was limited on testimony she could give concerning Crandall's character. Character evidence (particularly evidence concerning Crandall's violent nature and his control over people) was essential to her defense and could have been presented had they not been tried together. La. C.Cr.P. Art 701, see Statutes and Constitutional Provisions.

Normally, co-defendants are tried together; however, circumstances often exist where it is essential that defendants be tried separately. The various cases refer to severance being necessary when the defendants have mutually antagonistic defenses. This would cause the defendant to defend the charges brought by the state and the charges brought by the co-defendant. As always, the need for severance depends on the facts of each case. State v. Prudholm, 446 So.2d 729 (La., Jan 16, 1984) State v. Turner, 365 So.2d 1352 (La. Dec 15, 1978)

The minutes of the court reflect the following:

1. 4/11/90 Defendant Willars is in open court with Counsel Robert Raley, Motion is called. State will not sever cases and will not call case for trial Monday, April 16, 1990. Case is continued to be reset by notice (Kitchens)

2 Honorable Judge Harmon Drew later ruled

p. 9, line 13 THE COURT...Then just for clarity, Madam Clerk, on the Motion in Limine filed on behalf of Mr. Crandall today, while I was instructing Mr. Raley not to seek to elicit testimony from his client merely for the purpose of showing the alleged bad character of Mr. Crandall, I will allow him to elicit the testimony from his client in explaining her situation and explaining her side of the case. So I will deny the request to limit the testimony extended by Mr. Stinson. I'll note that he assigns error to the Court's ruling. And my reasons for my ruling are—contained in the short memo that's attached to the outside of the envelope. And for one thing, the remedy in a situation like this normally would

be a severance. Short of a severance, which I don't think either defendant wants, short of a severance, I don't know what else to do but allow her to tell the story. And I will give –the appropriate limiting and cautionary instructions later…"

The decision of Judge Kitchens not to sever and the ruling that short of severance, this problem could not be cured resulted in a decision which was exercised arbitrarily or to the prejudice of the accused State v. McGraw, 366 So. 2d 1278 (La. 1978) at 1283. The decision not to sever the trial denied Willars the opportunity to present critical evidence in her defense.

SPEEDY TRIAL

Willars was denied her Constitutional Right to a speedy trial. One of the reasons Willars sought a severance was because the trial was constantly being continued due to the actions of James Crandall. Additionally, her case was put on hold while Robert Raley and Jim Bullers ran for office. Jim Bullers ran for District Attorney and Robert Raley ran for judge on a "get tough on crime campaign."

The two bases for defendant's right to a speedy trial are contained in La. C.Cr.P. Art 701, Article 1, Section 16 of the Louisiana Constitution of 1974 and the Sixth Amendment to the

United States Constitution. The court in State v. Beauchamp, 510 So. 2d 22 (La. App 1st Cir. 1987), writ denied. 512 So. 2d 1176 (La. 1987); State v. Sosa, 446 So. 2 429 (La. App 4th Cir 1984), writ denied 469 U.S. 866, 105 S. Ct. 209.

La. C.Cr P. 701 does not bar prosecution but merely authorizes pre-trial relief; however, the Constitutional right to a speedy trial is not dependent upon a motion, but rather, attaches when an individual becomes an accused, either by formal Indictment or bill of information, or by arrest and actual restraint, State v. Pleasant, 489 So2d 1005 (La. App 1st Cir 1986), writ denied, 493 So.2d 1218 (La. 1986). Three considerations underlie the right to a speedy trial.

1) Prevention of undue and oppressive incarceration prior to trial.
2) Minimization of anxiety and concern accompanying public accusation, and

3) The possibility that long delay would impair the ability of an accused to defend himself. The factor of anxiety of the accused refers to a presumptively innocent defendant who must live under a cloud of suspicion until he has an opportunity to establish his innocence. State v. Johnson, 463 So2d 458 (La. 1978).

Speedy trial claims are evaluated under the four-factor test enunciated in Barker v. Wingo[i], 407 U.S. 514, 92 S.Ct., 2182, 33 L.Ed 2d 101 (1972). The considerations in determining whether a defendant has been deprived of a speedy trial are length of the delay, reasons for delay, defendant's assertion of his right and actual prejudice to defendant.

If the delay is presumptively prejudicial, there will not be an inquiry into the other factors. The peculiar circumstances of the case will determine the weight to be ascribed to the length of the delay and the reason for the delay. State v. Beauchamp, supra at 28, cited in State of Louisiana v. Walter Cowger, No. 90-KA-715 Court of Appeal of Louisiana, Fifth Circuit March 13, 1991.

The state did not diligently or in good faith afford this defendant a speedy trial.

The denial of Gail Willars' right to a speedy trial caused her conviction. Zachary was only eight when the death occurred and nearly ten when he testified at trial. Two years is enough time to cloud and taint the child's memory. Zachary was living with people who were benefiting financially by Willars remaining incarcerated (Alders and Page). They were receiving $1,000.00

per month to care for Zachary. They had two years to poison Zachary against his mother. Why did Zachary stay with these people rather than his own family?

FAIR AND IMPARTIAL TRIAL, IMPROPER/ INADEQUATE JURY INSTRUCTIONS

Jury Instructions were in error. They did not adequately explain the burden of proof in cases based on circumstantial evidence. The law on circumstantial evidence was merely cited with no explanations, or no tying in how that would affect the Willars case. A copy of the jury instructions are in the Appendix page 3.

Robbery under La. R.S. 14:64 & 64.1 is defined as follows:

> ...robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation...

Robbery in Louisiana is a specific intent crime. You cannot use force or intimidation on a dead man. The jury should have been instructed that you couldn't use force or intimidation on a dead man. The jury should have been instructed that "Timing is everything" If you find as a matter of fact that there

was no intent to rob Charles Parr while Charles Parr was alive, you cannot find that James Crandall and Gail Willars were involved in the commission of a robbery. The killing of Charles Parr might still be a crime; but that crime would be of a lesser degree than first and second-degree murder.

The United States Court of Appeals, 5th Circuit, in Humphrey, III vs. Cain, 120 F.2d 526, 138 F.3d 552 (5th Cir La.) Apr.03, 1998),reversed a State Court conviction on appeal from a Petition for Writ of Habeas Corpus because of improper jury instructions. The court en banc decided:

> "We took this case en banc to resolve conflicting panel decisions whether Cage-Victor error fits within the second Teaque exception, making it available in Federal Habeas to a state prisoner whose criminal conviction was final when those cases were decided. We overrule all prior decisions of this court holding to the contrary. For the reasons stated in the panel opinion, we hold that the jury instructions defining reasonable doubt lowered the State's burden of proof below the constitutional minimum. We reverse the district court's judgment denying the Writ of Habeas Corpus and remand the case to the district court with instructions to order the State of Louisiana to either try Elmo Humphrey, III again or release him from custody within 90 days of the date of the district court's order on remand."

The court concluded:

> "the reasonable doubt instruction did not give the defendant the benefit of reasonable doubt as elucidated

by the Supreme Court In Re Winship, 397 U.S. 358, 90 S.Ct 1068 (1970), Cage v. Winship, 498 U.S. 39, 111 S.Ct. 328 (1990) (per curiam) and Victor v. Nebraska 511 U.S. 1, 114 S.Ct 1239 (1994)."

The 5th Circuit panel commented on the fact that the Humphry case was a close and difficult case. The court also commented:

> p. 533 "Of course, a case need not be close in order for us to find reversible error in the reasonable-doubt instruction. But, Humphrey's is a close case nevertheless and makes clear the importance of affording defendants the rights established in Cage and reinforced in Victor. This is not to suggest that Humphrey's conviction was not supported by sufficient evidence; only that evidence was meager and the conviction unpredictable."

Failure of the trial court in the Willars case to explain what a "circumstantial evidence case is" and go over the standard of review in more detail for circumstantial evidence cases was a defect in the "reasonable doubt" instructions as it affected Gail Willars.

PROSECUTION'S IMPROPER COMMENT ON THE EVIDENCE, DENIAL OF RIGHT TO CONFRONTATION

P. 79-81 of the appendix contain excerpts from the prosecution's closing arguments, not based on facts in evidence, intended only to appeal to the prejudices of the jury.

P. 1455, transcript "If she (Gail) cared anything about Zachary, she would have left him in Houston. She only cares about herself. Look what she put this poor boy through."

P. 1455, line 32 "She could have saved a man's life. She chose not to and used her son; blames it on him. Oh! I was worried about him."

Nothing in evidence supported the fact that Parr was alive when Willars and Crandall left him. Willars testified that she believed Parr to be dead. The comments made in the prosecution's closing arguments were intended merely to show "Gail was a bad mother" and lead the jury to believe Willars' inaction caused Parr's death.

SUFFICIENCY OF THE EVIDENCE

Sufficiency of evidence was argued at all levels. But for the testimony of Zachary and Ms. Alders, there would be no evidence that would support a belief that Willars intended to hurt Parr in any way.

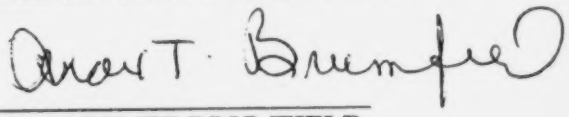
There was no evidence that Willars lured Parr into her room for anything but prostitution. The intent to rob would have had to be inferred from circumstantial evidence. In Louisiana, in order to convict on circumstantial evidence, every reasonable

hypothesis of innocence must be ruled out. This was not done. (statutes and Constitutional Provisions.)

CONCLUSION

The 5th Circuit Court of Appeals erred in denying Certificate of Appealability. A substantial showing of denial of Constitutional rights has been shown and Willars is entitled to her appeal. We respectfully pray that this court grant a Writ of Certiorari and reverse the conviction. In the alternative, Petitioner prays that a Writ of Certiorari be granted and this case be remanded to the 5th Circuit Court of Appeals (or whatever court this court deems appropriate) for further proceedings.

RESPECTFULLY SUBMITTED



ARAX RENEE BRUMFIELD
Attorney at Law
La. Bar No. 03594
P. O. Box 4108
Baton Rouge, Louisiana 70821
(225) 292-6151
(225) 292-6150 fax